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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 907

ABRAHAM DOBKIN, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on October 15, 1964 (rehearing denied January 15, 1964). The judgment affirmed petitioner's conviction for violating the unlicensed adoption statute of the District of Columbia, D.C. Code § 32-785, 788, Act of April 22, 1944, c. 174, 58 Stat. 194, 195.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 194 A.2d 657 (1963). (App. 1a-5a). The order of the United States Court of Appeals for the District of Columbia Circuit affirming that judgment is not reported (App. 7a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 15, 1964 (App. 7a). A timely petition for rehearing *en banc* was denied on January 15, 1965, one judge dissenting (App. 8a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES INVOLVED

D.C. Code, § 11-715a, Act of March 3, 1925, c.443 (43 Stat. 1120), provides in pertinent part as follows:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

D.C. Code, § 22-104, Act of March 3, 1901, c.854 (31 Stat. 1337), provides:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

QUESTIONS PRESENTED

1. Whether the multiple offender statute of the District of Columbia, D.C. Code § 22-104, by which the permissible penalty is increased by 50 percent upon a second conviction, places the petitioner within the class of persons entitled by statute to a trial by jury under D.C. Code § 11-715a.

2. Whether the petitioner, a Jew, could have constitutionally been required over his objections to proceed to trial after sundown on Friday, the advent of his religious sabbath.

STATEMENT

Petitioner, a practicing attorney, was convicted and sentenced by the District of Columbia Court of General Sessions sitting without a jury, upon an information charging him with violating the District of Columbia unlicensed adoption statute, D.C. Code §§ 32-781 to 32-789. This petition raises two questions with respect to the manner in which the petitioner was tried.

Notwithstanding that the offense of which petitioner was charged carried a maximum penalty of $300 and ninety days and thus was not one in which a jury trial was constitutionally required, *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *Rogers* v. *District of Columbia*, 31 A.2d 649 (D.C.Mun.App. 1942), petitioner moved prior to trial that he be tried by a jury. As a second offender under that statute, the maximum punishment which he could have received was 50 percent greater. This increased penalty should have entitled him by statute to a jury trial. The motion was denied by a judge of the Court of General Sessions. Immediately prior to the time the trial was to com-

mence, the petitioner notified the court that his religious sabbath had begun, and asked for an adjournment from Friday night until Monday morning. This request was denied and the trial went forward. The petitioner was convicted at 8:15 p.m. on Friday night. The District of Columbia Court of Appeals affirmed the conviction (App. 1a-5a) holding: (1) that due process barred the imposition of second offender punishment in the absence of being charged as such and (2) that petitioner's religiously founded objection to a trial on his sabbath was not well taken. A division of the United States Court of Appeals for the District of Columbia Circuit granted a petition for review of that judgment (App. 6a). Another division affirmed, per curiam, on the basis of the lower court opinion (App. 7a) and a petition for rehearing *en banc* was denied, Circuit Judge Fahy dissenting (App. 8a).

REASONS FOR GRANTING THE WRIT

1. D.C. Code § 11-715a, the minor offense statute, reads:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

But, D.C. Code § 22-104, a correlative statute, provides:

> "Every person upon his second conviction of any criminal offense punishable by fine or impris-

> onment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

By virtue of the second statute that provides a 50 percent greater penalty upon the second conviction of certain offense (including the one for which the petitioner was convicted), petitioner's permissible sentence was 135 days and $450, clearly within the jury trial provisions of D.C. Code 11-715a.

Both the District of Columbia and the court below sought to avoid the logic of this argument by asserting that since the petitioner was not specifically charged as a second offender in this information, he could not, consonant with due process, have been given the increased penalty. They further reasoned that since he could not have been given the increased penalty, he was not entitled to trial by jury. This argument, however, founders upon the holding of *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962), that a second offender need not be so charged to justify the imposition of multiple offender punishment. The criminal act which is proscribed for a second offense is the same regardless of the background of the criminal. The previous offense is merely an "historical fact" as a result of which the penalty may appropriately be increased because of the demonstrated proclivities of the defendant. *Jordan* v. *United States District Court*, 233 F.2d 362, 367 (D.C. Cir. 1956). What was present here was the historical fact of a prior conviction as a result of which the petitioner could receive a more serious penalty. And as a result of such increased penalty, in this case, the petitioner fell within the provisions of D.C. Code, § 11-

715a, and was entitled by statute to a trial by jury. The right to trial by jury, a right "so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute," must be zealously safeguarded by the courts. *Jacob* v. *City of New York*, 315 U.S. 752, 753 (1952). The lower courts both erred in failing to recognize this. *Jacobs* v. *United States*, 24 F.2d 890 (D.C. Cir. 1928), which was considered controlling by the courts below, held that a party proceeded against under the statute involved in that case for a second or third offense had a right to have that fact averred in the indictment. But that decision was one compelled by that statute, which itself required "allegation and proof of prior conviction" in the indictment. See *Jackson* v. *United States*, 221 F.2d 883, 885 (D.C. Cir. 1955), n.2. Reliance upon *Jacobs*, in the absence of a statute requiring such a result, misconceives the import of *Oyler* v. *Boles, supra.* .

This Court, in *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937), upheld the constitutionality of allowing the Court of General Sessions to proceed without a jury in criminal cases in which the offense carried a penalty of up to ninety days. But Justice Stone cautioned:

> ". . . commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty thought mild may come to be regarded as so harsh as to call for the jury trial . . ." 300 U.S. at 627.

Whether reconsideration of *Clawans* is called for need not now be decided. But *cf. Rollerson* v. *United States*, — F.2d —, — (D.C. Cir. No. 17675, 10/1/64. In the light of *Clawans*, however, the statutes involved, D.C. Code §§ 11-715a and 22-104, must be interpreted in circumstances such as these to authorize a jury

trial in order to insure their constitutionality. The failure of the courts below to recognize this fact was error.

2. When this case was called for trial on Friday, December 14, 1962, it was after 6 p.m. The petitioner's religious sabbath began at sundown that day, at 4:47 p.m. When he raised this with the trial court and asked for an adjournment only until Monday morning, his request was denied.

The authorities are uniform that Sunday, at common law, was *dies non juridicus*. *State* v. *Rhodes*, 11 N. J. 515, 95 A. 2d 383 (1953); *Housing Authority of Dallas* v. *Blackman*, 254 S.W. 2d 548 (Tex. Civ. App. 1952); *State* v. *Hereford*, 131 W. Va. 84, 45 S.E. 2d 738 (1947); *Pedersen* v. *Logan Square State Savings Bank*, 377 Ill. 408, 36 N.E. 2d 732 (1941); *Blizzard* v. *Blizzard*, 62 Ga. App. 2d 244, 8 S.E. 2d 679 (1940); *Harrison* v. *Bayshore Development Company*, 92 Fla. 875, 111 So. 128 (1927). No statute in the District of Columbia has altered the fact.

The recognition of Sunday as "dies non juridicus" was religious in origin. This court's decision in *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) makes that clear. It was made equally clear in *Story* v. *Elliot*, 8 Cowen 27, 28 (N.Y. 1841), where the court observed:

> "Sunday is stated in all the books to be *dies non juridicus;* not made so by the statute: but by a canon of the church, incorporated into the common law."

If the recognition of Sunday as "dies non juridicus" arises from religion, as it clearly does, it must be abundantly clear that one who observes a day other than Sunday ought not to be forced to violate his be-

liefs by being forced to litigate on his sabbath. The court below recognized that basic principle when it held:

> "We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship." (App. 3a).

But once having adopted this principle, the court erred by going behind the petitioner's beliefs and practices and deciding whether he observed his sabbath sufficiently to come within that rule. Such an inquiry is not constitutionally permissible. Church attendance or nonattendance is not a matter of governmental inquiry. *McCollum* v. *Board of Education,* 333 U.S. 203, 210 (1948). And in *Braunfield* v. *Brown,* 366 U.S. 599, 609 (1961), this Court indicated that an "inquiry into the sincerity of the individual's religious beliefs" would raise serious constitutional issues. Yet this is precisely what the trial court did and what the courts below sanctioned.

What the courts below all failed to do was to strike a proper balance between the petitoner's right to the unfettered exercise of his conscientious beliefs and the government's right to insure the orderly functioning of the courts. Reduced from this abstract principle to application in this case, what should have been balanced was the petitioner's right to observe his sabbath as opposed to the government's desire to have him tried on Friday evening, rather than on Monday morning. Stated in these terms, it seems hardly to admit of argument that the petitioner was entitled to the adjournment which he requested.

Very close analogy is found in *In re Jenison,* 265 Minn. 96, 120 N.W. 2d 39 (1963), certiorari granted

and case remanded 375 U.S. 14 (1963), reversed on remand, — Minn —, 125 N.W. 588 (1963), and in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Both cases illustrate the type of balancing of rights that should have been done by the courts below. Mrs. Jenison was convicted of contempt for refusal to serve on a jury because of her literal belief in the Biblical admonition "judge not lest ye be judged." Her conviction was affirmed on the grounds that the state's need of jurors outweighed her religiously based refusal to act as such. *In re Jenison*, 265 Minn. 96, 120 N.W. 2d 39 (1963). On petition for certiorari, this Court granted the petition, vacated the judgment and remanded the case for further consideration "in light of *Sherbert* v. *Verner*, 374 U.S. 398." *In re Jenison*, 375 U.S. 14 (1963). In *Sherbert* v. *Verner, supra*, this Court reversed the denial of unemployment compensation benefits to a Seventh Day Adventist for her refusal to work on Saturday. The opinion clearly suggested that the interests of the state must well outweigh the religious interests of the particular applicant before any state action can impinge upon a First Amendment religious right. The Supreme Court of Minnesota on remand in *In re Jenison*, — Minn. —, —, 125 N.W. 2d, 588, 589 (1963) recognized this when it held:

> "Upon reconsideration we have come to the conclusion *there has been an inadequate showing that the state's interest* in obtaining jurors *requires us to override relator's right to the free exercise of her religion.* Consequently, we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." (Emphasis supplied.)

In accord see *People* v. *Woody*, — Cal. 2d —, 394 P. 2d 813 (1964).

No reasonable argument can be made for requiring a trial on Friday night. The District of Columbia asserted that such a trial was necessary because "the government's necessary witness would be returning to her home in North Carolina, beyond the jurisdiction of the Court." Brief for Appellee in United States Court of Appeals in Opposition to Petition for Allowance of an Appeal, p. 8. But no reason is given why this witness could not have been placed under subpoena either to require her to remain in the District of Columbia until Monday or to return here on that day. That such power existed has never been denied. The government also asserted that this was but a delaying tactic; yet, no suggestion has yet been made as to what the petitioner could hope to accomplish in delaying the case between Friday and Monday. In short, the District of Columbia advanced no reason whatever why trial had to be between 6:07 p.m. and 8:15 p.m. on Friday night rather than on Monday morning. Under these circumstances, it was error of constitutional magnitude to force the appellant to proceed to trial. And under such circumstances, this Court would be justified in according this case the same summary remand as in *In re Jenicm, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be granted.

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February, 1965